No. 370.
Reply Brf. of Winslows for Appt.

Office Supreme Court U. S.
FILED
JAN 17 1900
JAMES H. McKENNEY,

Filed Jan. 17, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

JOHN T. BOSKE, Sheriff of Kenton County, Ky., - - Appellant,

vs. No. 17,494.

DAVID N. COMINGORE, - - - - - - - - - Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT.

HENRY M. WINSLOW,
For Appellant.

CLIFTON J. PRATT,
Atty. General.

WINSLOW & WINSLOW,
Of Counsel.

F. C. HUNNEMACHER PRESS, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 370.

JOHN T. BOSKE, SHERIFF OF KENTON COUNTY, KY., *Appellant*,

vs. **No. 17,484.**

DAVID N. COMINGORE, ... *Appellee.*

REPLY BRIEF ON BEHALF OF APPELLANT.

We desire to reply, in as few words as possible, to some of the points raised by the learned counsel of the appellee.

I.

AS TO RIGHT TO APPEAL FROM DISTRICT COURT DIRECT TO THE SUPREME COURT.

This right is questioned in mild form on pages 13 to 17 of brief for appellee.

The appeal is clearly authorized by the Act of March 3, 1891, quoted on pages 14 and 15 of appellee's brief. On page 15 it is clearly stated that an appeal may be taken direct to this honorable Court in cases as follows:

> "In any case that involves the construction or application of "the Constitution of the United States, and
>
> "In any case in which the constitutionality of any law of "the United States . . . is drawn in question."

Clearly each of the foregoing paragraphs authorizes this appeal to this Court. The District Court held (transcript, page 11) "that the imprisonment and detention of the relator by the respondent is in violation of the Constitution and laws of the United States." The "Petition for Appeal" (transcript, page 29) and the "Assignment of Errors" (page 20) likewise show clearly

that the construction and application of the Constitution of the United States is involved in the controversy. The constitutionality of certain laws of the United States is also involved. It seems clear, therefore, that there can be no reasonable doubt as to our right to appeal direct to this honorable Court.

II.

Amendments V and XIV to the Constitution of the United States Have No Application to the Case at Bar.

Pages 19 to 27 of brief for appellee is taken up with an attempt to show various alleged errors in the proceedings in the State Court, and counsel insists that on account of these *errors* the commitment of Comingore was without "due process of law." The errors in the proceedings in the State Court can not be revised in a *habeas corpus* proceeding, unless the court was entirely without jurisdiction in the matter. There is no question raised anywhere in this whole proceeding as to the jurisdiction of the Carroll County Court over both the person and subject matter. Assuming, therefore, that all the errors stated by appellee were made (though we will hereafter show that he is clearly mistaken as to the facts) they could not and can not be considered in this proceeding, because none of them were jurisdictional.

This point is clearly settled by the decision in *Ex parte* Reed, 10 Otto, 13-25, from which we quote as follows:

> "Here there was no defect of jurisdiction as to anything "that was done. Beyond this we need not look into the record. "Whatever was done, that the court could do under any circum- "stances, we must presume was properly done. If error was "committed in the rightful exercise of authority, we can not "correct it. A writ of *habeas corpus* can not be made to per- "form the functions of a writ of error. To warrant the dis- "charge of the petitioner the sentence under which he is held "must be, not merely erroneous and voidable, but absolutely "void. (Citing *ex parte* Kearney, 7 Wheat., 38; *ex parte* "Watkins, 3 Pet., 193; *ex parte* Milligan, 4 Wall., 2.")

And see also, for later decisions,

Ex parte Crouch, 112 U. S., 178.

Ex parte Lennon, 166 U. S., 552, in which the foregoing authorities are cited and approved.

The effort is made in the brief for appellee to show that Comingore was taken in custody solely by virtue of a writ issued by Price, the notary public, and that the notary had never certified

his action to the Court as provided by the Kentucky Code of Practice. This is not in accordance with the facts as the record itself truly shows. The attorney for the petitioner in the District Court fell into this error. Judge Evans followed in his footsteps, and now counsel for appellee brings it up in detail and presents it so plausibly that we would be almost inclined to believe it ourselves were it not for the fact that we know the contrary is true, and that the record so shows.

It is true that Comingore was imprisoned under a warrant or order from the notary, as stated in the petition and as stated by the District Judge in his opinion, but it is not true that this was the *only* process as is shown by the warrant from the notary appearing in the transcript near the close of page 9, and also shown by the response of the Sheriff (transcript, page 11) wherein he says that he detained and imprisoned the petitioner.

> ". . . Under warrant of commitment from W. A. Price, as "Notary Public for Kenton Co., Ky., of date June 27, 1899, "AND *under order and judgment of the Carroll County Court "attached thereto*, and copies of which are *hereto attached*."

By referring to the closing portion of the judgment of the Carroll County Court, it will be found that the judgment and order of the Court was made the *warrant for commitment.* The language is as follows:

> "The Clerk of the Court is ordered and directed to make out "attested copies of this judgment and order, and forward same "to the Sheriff of Kenton County, Ky., and W. A. Price, "Notary Public, as warrant and authority for the enforcement "thereof." (Printed transcript, page 8.)

Note that this pursues the same form as to warrant as was used in the celebrated Terry case, 128 U. S., 298.

All the provisions of sections 535 and 538 of the Kentucky Code (cited by appellee) were fully complied with *verbatim et literatim.* The deposition of Comingore was attempted to be taken March 1, 1899; he refused to disclose and the notary adjudged him to be in contempt; the notary then certified his action in the matter to the Court, and the Court approved his action in every particular. These facts are shown in the opinion of Judge Evans, pages 16 and 17 of record, and a part of the judgment of the Court is there copied, but that portion making the same the warrant of commitment is not quoted by Judge Evans. Afterward, to-wit, on June 27, 1899 (as shown by Judge Evans' opinion, page 18), the attorneys for plaintiff in the State Court appeared and attempted to complete the deposition and to give the witness the opportunity to purge himself of the contempt after seeing that

the Court itself had actually passed upon the question. The witness still refused and in order that continuous refusal and contempt might be made to appear of record, the notary issued his own warrant of commitment, in *addition* to the one issued by order of the Court itself, and this, TOGETHER WITH THE ONE ISSUED AND CERTIFIED UNDER THE ORDER OF THE COURT, were BOTH placed in the hands of the Sheriff and the relator was arrested and detained under BOTH WARRANTS. The warrant from the notary, and all the proceedings had before him on June 27, 1899, were purely precautionary measures. The warrant from the Court was certainly valid and the mere fact of the Sheriff having an additional writ which may or may not have been invalid, could not invalidate the valid writ or the acts done thereunder.

III.

As to Exhibits "A," "B" and "C," Attached as Part of Brief for Appellee and Referred To on Pages 29 to 33, and 40 to 48 Thereof.

It is rather strange that these forms should be brought into the matter, as they do not elucidate the questions involved. They are not the forms which, if filled out, would show the facts sought to be shown by the questions propounded to the relator when interrogated as a witness in the State Court proceedings.

The forms, the filling out of which constitute the reports as asked for in questions 3, 4 and 5, as shown on page 2 of transcript, as to the *deposit* of these liquors in bond and the *requests* made for privilege to withdraw on payment of the tax, and made by the distillers themselves, are provided for by sections 3293 and 3294 of the Revised Statutes, and are known and numbered as forms 240 and 179, respectively.

The form, the filling out of which constitutes the *reports of the storekeepers* as asked for in question 23, and as followed up in question 24 propounded to the witness (transcript, page 12), and the facts in which show only the amount of liquors on hand in the custody of the storekeeper in the warehouse at the date of the monthly reports, is provided for by Section 3301 of Revised Statutes, and is known and numbered as Form 87, pages 4, 5 and 6, of which form, made out monthly, show just the amount of liquors on deposit at the date of the report and when the liquor was manufactured and deposited in bond and how long it remained there.

Form 87 (to pages 4, 5 and 6 of which we call especial attention) is filled out by the United States storekeeper in charge thereof, from his own personal knowledge as a report to the Collector, and from the reports made on such forms the desired

facts asked for could be ascertained at a glance. They disclose nothing whatever as to the operations of the distillery or anything of that character.

We hope to be able to obtain copies of these forms to append to this brief, but if not the Court can see from the law enacted in the sections referred to that the character of their contents is necessarily as we have described it as contradistinguished from the forms filed with the brief for appellee for reports under other sections. We do not care for the reports made in pursuance of sections 3263, 3303, 3304 or 3307, as to which the argument is made in brief for appellee, and which embrace the plans and operations of the distillery, but only desire the reports made in pursuance of sections 3293, 3294 and 3301, and more especially the latter one made in what is known and numbered as Form 87, which certainly does not disclose anything as to the plans, machinery or mode of operation of the distillery, and will disclose nothing whatever that can possibly be of a secret or privileged character.

IV.

As to Section 3167, Revised Statutes, as Amended by Act of August 28, 1894.

This is referred to on pages 33 to 35 of brief for appellee.

We think appellee misconstrues this section of the statute entirely, and, in fact, he does not seem to rely very strongly thereon. The only fact that the Commonwealth desired disclosed in the State Court proceeding was the *amount* of liquors on hand at certain dates. We asked for nothing else and the documents asked for by us will disclose nothing else. The statute in no way attempts to prohibit a disclosure of the *quantity* of liquor on hand. It evidently refers to secret processes, trade secrets, particular apparatus, and other things of like nature which would have a tendency to assist one distiller to the detriment of another; even then there is nothing in the statute to prohibit a disclosure in any manner "provided by law."

On this point see *In re* Hirsch, 74 Fed., 934, cited in our original brief.

V.

As to "Regulations" Being "Laws."

Appellee insists (see brief, pages 35 to 41) that the regulations of the Treasury Department are in fact the *laws* which justified Comingore in his refusal to testify and furnish the evidence as requested.

We have fully shown on pages 23 to 30 of our original brief that said regulations are not laws; that so far as they attempt to change, alter, amend or prescribe rules for the production of evidence, they are not attempted to be authorized by any act of Congress, and to that extent do not pertain to the "assessment and collection of revenue"; that Congress has in no sense attempted to confer on the Treasury Department the power to make *laws;* that any such attempt to confer legislative authority on the Executive Department would be contrary to the plain provisions of the Constitution of the United States; and that any attempt by the Executive Department to declare the law as a *finality* would also be unconstitutional, and an encroachment upon the assumptions of the functions of the Judicial Department.

Furthermore, the authorities cited on page 37 of the brief for appellee do not at all support his view as to the effect to be given the regulations in controversy; neither does his statement as to the contents of these authorities bear out the position taken by him on the merits of the case. On page 37 he says:

> "Regulations made by the Secretary of the Treasury under "Section 251 of the Revised Statutes, *not inconsistent with law*, "and fairly within its scope and purpose, and *not infringing* "*upon any existing legal rights of individuals*, have the force "of law.
>
> "Regulations made by the Commissioner, pursuant to the "statutory authority, with the approval of the Secretary of the "Treasury, *in respect to the assessment and collection of internal* "*taxes*, have the force of statutes."

We respectfully submit that the regulation in controversy, in so far as it attempts *to prescribe the rules and fix the laws in regard to the production of evidence*, is "inconsistent with law," and is "infringing upon the existing legal rights of individuals" and other litigants, and is in no sense a regulation "in regard to the assessment and collection of internal taxes."

For these reasons the Secretary and the Commissioner have exceeded the authority conferred upon them by the statute, and therefore the regulation attempted to be applied to this case can not have the force of a statute, and much less can it be *law*.

Attention is also called to the fact that every statute conferring authority to make "regulations" has the saving clause therein that they must not be "inconsistent with *law*," and it seems to us that Congress has been so careful in using the words as to show clearly that it fully realized that the words were not synonymous, and that it was not intended to use them synonymously, but guarded carefully the constitutional limitation placed upon that body.

VI.

As to There Being no Law Which Required Comingore to Comply With the Demands Made Upon Him.

This proposition is argued on pages 48 and 49 of brief for appellee.

We respectfully submit that such a proposition is immaterial in this Court and at this stage of this proceeding. The only proper question here and now is, does the Constitution and law of the United States *forbid* the production of the testimony? This is a *habeas corpus* proceeding, and that is the only possible ground on which to base the action. The burden is on the petitioner to sustain his plea and he can not shift it.

But aside from this we deny the proposition *in toto*. It would be a mere repetition, however, to argue the point at length at this time. The authorities therefor are fully set forth in our original brief, and the State Court in a well considered opinion showed that there was an abundance of authority for requiring the production of the testimony and that opinion is copied in full in the transcript.

VII.

Control of Papers and Competency of the Evidence.

It is insisted by appellee that the Collector was not in control of the papers, and that a *subpœna duces tecum* should have been issued against the head of the Treasury Department therefor. This objection is fully met in the Hirsch case, 74 Fed., 934, where the person having the papers in actual custody was merely a *deputy* collector.

In addition to this we suggest that a subpœna issued from a State court of Kentucky, and served some six hundred miles beyond the jurisdiction of the court, would be of little force or effect. It would in all probability cause some amusement, and could be treated with absolute contempt without fear of serious consequences.

The Assistant Attorney General in his brief, page 49, makes another suggestion, as follows:

> "I have been unable after considerable research to find a "single case where a copy of a paper certified by a Collector of "Internal Revenue has been held to be competent testimony in "a judicial trial."

Not waiving the point as to this being a question purely and solely for the State Court and in no wise proper in this inquiry,

we suggest for his information that there is a statute in Kentucky fully covering the point. It reads as follows:

"1636. *Public records of other States or United States.* "All records and exemplifications of office books kept in any "public office of the United States, or of a sister State, *not* "*appertaining to a court*, shall be evidence in this State if "attested by the *keeper* of such record or books, and the seal of "his office, if there be a seal."—(Kentucky Statutes, Ed. 1894, Section 1636.)

Furthermore, while we can find no decision using the word "collector" therein, the principle is fully and clearly announced by this honorable Court in Evanston vs. Gunn, 9 Otto, 666-7, and in White vs. United States, 164 U. S., 100, both of which are cited in our original brief, page 15.

VIII.

As to the Reports or Documents Being Privileged.

This is referred to in the brief of the Assistant Attorney General, pages 50 and 53.

On this point we call particular attention to the language used by Judge Shipman in his opinion in the Hirsch case, 74 Fed., 934. It is clear, forcible and conclusive, and reads as follows:

"It is next said that these returns are *privileged.* It is "*probable* that a *statute* could declare that communications of "*tax payers* to a board of assessors or officers of similar char- "acter should be privileged, and that no returns can be exam- "ined by any one, or be reached for examination by legal "process. The thirty-fourth section of the Act of August 27, "1894, which endeavored to make income tax returns entirely "free from examination or inspection by unauthorized persons, "*did not go so far as to say that they could not be subject to* "*examination by courts, but declared their freedom from exam-* "*ination 'except as provided by law.' In the absence of such* "*provisions the returns now in question are no more privileged* "*than other tax payers' returns, in the sense that they must be* "*kept secret, and cannot be produced for the purpose of evidence* "*in a legal proceeding by order of court.*"

The thirty-fourth section of the Act of August 27, 1894, (referred to above by Judge Shipman) is an amendment to Section 3167 of the Revised Statutes, which is the only *statute* relied on by appellee for prohibiting the production of the testimony in question.

IX.

As to Conflict Between the Hirsch Case and the Cases of Huttman and of Weeks.

It is conceded by both parties to this controversy that there is a conflict of opinion in these cases.

The Huttman case and the Weeks case are both decisions of District Courts. The Hirsch case (74 Fed., 934), in an opinion from the Circuit Court in which the points involved are elaborately discussed, and that decision was appealed to the Circuit Court of Appeals, and there duly affirmed (87 Fed., 1005.) The question seems to narrow itself down as to whether or not this Court will follow the two District Courts, or will it follow the two higher Courts. Circuit Judge Shipman's views are certainly in harmony with the common law, and the law of Kentucky, and the Constitution and laws of the Uuited States; while the opinions rendered in the Huttman and Weeks cases seem to us to be in conflict with every sort of law, and are certainly in harmony with no law, unless the "regulations" are held to be laws, which hardly seems possible in view of the Constitution. We observe that the learned Assistant Attorney General does not attempt to refute the argument presented as to the unconstitutionality of any law attempting to authorize the Executive Department to amend, alter or repeal law.

We also call attention to the fact that we present even a stronger case than the Hirsch case, because that was a criminal case, just as the Huttman and Weeks cases were, while the present controversy is in a *civil* case, as was adjudged by the District Court itself, and as has been conceded all through the controversy.

X.

As to the Inconvenience of the Rule of Law Contended for by Appellant.

Appellee argues this point with seeming earnestness on the closing page of his brief. His argument is fully answered by Judge Shipman in the Hirsch case, but we are not compelled to rely on that case alone on this point, for this honorable Court has spoken thereon, as follows:

"The argument of inconvenience has been pressed upon us "with great earnestness. But where the law is clear, this "argument can be of no avail; and it will probably be found "that there are also serious inconveniences on the other side. "Wherever power is lodged it may be abused. But this forms "no solid objection against its exercise. Confidence must be

"reposed somewhere; and if there should be an abuse, it will "be a public grievance, for which a remedy may be applied by "the Legislature, and is not to be devised by courts of justice. "This argument was also used in the case already cited, and the "answer of the Court to it is so satisfactory that *it would be* "*useless to attempt any further refutation.*" *Ex parte* Kearney, 7 Wheat., 45.

But we deny that there will be any great inconvenience to the Department, for when the distillers learn that this honorable Court will not sanction their frauds on the State, they will pay their taxes without further controversy.

We most respectfully ask a reversal with instructions as asked in our original brief.

HENRY M. WINSLOW,
For Appellant.

CLIFTON J. PRATT,
Atty. General.

WINSLOW & WINSLOW,
Of Counsel.